BRB Nos. 87-3668
and 90-1452

FRED R. QUAVE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PROGRESS MARINE, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN HOME INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION AND ORDER

Appeals of the Decision and Order on Remand of Parlen L. McKenna, Administrative Law Judge, United States Department of Labor, and the Decision and Order on Request for Section 22 Modification of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Fred R. Quave, Bogalusa, Louisiana, pro se.

Kathleen K. Charvet (McGlinchey, Stafford, Cellini & Lang), New Orleans, Louisiana, and James P. Lambert (Voorhies & Labbe), Lafayette, Louisiana, for employer/ carrier.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand of Administrative Law Judge Parlen L. McKenna and the Decision and Order on Request for Section 22 Modification of Administrative Law Judge Richard D. Mills (81-LHC-876N) rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et seq. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his lumbosacral spine during the course of his employment on November 24, 1975. Employer sent claimant to Dr. Newman who treated claimant for a severe contusion of the right hip. Dr. Newman determined that claimant had no permanent disability and discharged him on January 12, 1976. Claimant resumed his regular duties and continued to take medication prescribed by Dr. Newman until September 1977, when he stopped working due to increased back pain. Claimant returned to light duty work in November 1977 after seeking medical help, but was laid off in May 1978. He has not returned to work. He filed a claim on May 28, 1978.

In the original Decision and Order of Administrative Law Judge Pitard, the administrative law judge found that the May 1978 claim was not timely filed under Section 13 of the Act, 33 U.S.C. §913. Claimant appealed, and the Board held that as claimant's condition was misdiagnosed, claimant was not aware of the true nature of his condition prior to filing his claim. The Board noted that claimant's condition was not properly diagnosed until May 1981. Therefore, the Board reversed the finding that the claim was untimely and remanded the case for consideration on the merits.[1] See Quave v. Progress Marine, Inc., BRB No. 81-2312 (Feb. 25, 1986)(unpub.)

On remand, the case was assigned to Administrative Law Judge McKenna. A new hearing was not held, nor were the parties given the opportunity to submit additional evidence even though the Board's decision was issued five years after the initial hearing. Judge McKenna's decision was issued in December 1987, and he found that the evidence was sufficient to establish a prima facie case of a work-related injury and that employer did not rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The administrative law judge also found that claimant reached maximum medical improvement on January 12, 1976 when Dr. Cenac released him to return to work. After this date, the administrative law judge found, based on claimant's testimony, that claimant could not return to his usual work and awarded claimant permanent partial disability benefits, as the parties stipulated that claimant could secure employment at minimum wage, with a residual wage-earning capacity of $106 per week.

Employer appealed this decision to the Board on December 10, 1987. However, before the case could be considered by the Board, both parties requested modification before the Office of Administrative Law Judges. Therefore, the Board dismissed the pending appeal and remanded the case to the administrative law

[1] The Board also reversed the administrative law judge's finding that claimant was not entitled to reimbursement for medical expenses incurred between January 1976 and September 1977.

judge for consideration of the petitions for modification. The case was assigned to a third administrative law judge, Judge Mills, as Judge McKenna was no longer available to the Office of Administrative Law Judges.

Following a full evidentiary hearing, at which new testimony and documentary evidence was received, Judge Mills denied employer's request for modification. The administrative law judge found that although there was evidence of a change in claimant's physical condition, employer failed to establish suitable alternate employment. The administrative law judge also denied claimant's request for modification as he failed to show that he was at least temporarily totally disabled. Employer appeals this decision to the Board, and its previous appeal was reinstated.

In its appeal of Judge McKenna's Decision and Order on remand, employer contends that its procedural due process rights were violated by the failure to hold a formal hearing when the case was remanded and assigned to a new administrative law judge. Employer contends that due to the inordinate passage of time between the initial hearing and the issuance of Judge McKenna's decision, and because Judge McKenna made findings as to witnesses' credibility when he did not observe their demeanor, this decision should be vacated. In its appeal of Judge Mills' decision on modification, employer first contends that the claim for benefits is time-barred. Employer also contends that the administrative law judge erred in determining that claimant is disabled from returning to his former employment as this finding is based on Judge McKenna's credibility determinations. Employer further maintains that the administrative law judge erred in finding the evidence insufficient to establish suitable alternate employment. Finally, employer contends that claimant should be barred from pursuing a claim pursuant to Sections 26 and 31 of the Act, 33 U.S.C. §§926, 931, on the grounds that he perjured himself. Claimant has responded pro se with a letter dated September 27, 1991.

Initially, we reject employer's contention that the claim is barred under Section 13 of the Act, 33 U.S.C. §913. The Board addressed this issue in its previous Decision and Order, and that decision is the "law of the case." We will not now reexamine the issue. See Wayland v. Moore Dry Dock, 25 BRBS 53 (1991); Brocklehurst v. Giant Food, Inc., 22 BRBS 256 (1989).

Employer also contends that its procedural due process rights were violated by Judge McKenna's failure to hold a new formal hearing following the remand by the Board. Employer contends that in view of the long delay between the time of the initial hearing and the decision on the merits, it should have been notified that the case was assigned to a new administrative law judge and given the opportunity to submit new evidence. Moreover, employer

contends that as Judge McKenna did not observe the demeanor of the witnesses at the initial hearing, his conclusions of law based on his finding that testimony was credible should be vacated.

The Administrative Procedure Act provides that the administrative law judge who presides at the hearing shall render the decision unless he becomes unavailable to the agency. 5 U.S.C. §554(d). See 20 C.F.R. §702.332. If the presiding administrative law judge is unavailable and credibility of the witnesses is at issue, the parties have the right to a de novo proceeding before the new administrative law judge assigned to the case. Creasy v. J.W. Bateson Co., 14 BRBS 434 (1981). Thus, on remand, as credibility determinations were necessary to resolution of the case, Judge McKenna erred in not offering the parties the opportunity to request a new hearing. Id. at 436.

Judge McKenna's decision on the merits following remand rests on the credibility of the testimony of Dr. Cenac and claimant. Judge McKenna found that claimant was not capable of returning to work due to his work-related injury and that he had reached maximum medical improvement on January 12, 1976 based on the testimony and reports of Dr. Cenac, the only physician who testified at the original hearing. The administrative law judge also found that claimant was a credible witness and therefore credited claimant's testimony that his employment was terminated because of his disability which resulted from his injury on November 24, 1975. Ordinarily, since Judge McKenna was required to rule on the credibility of witnesses testifying at the prior hearing, his failure to hold a new hearing would require that we vacate the decision on this ground alone and remand the case. In this case, however, a full evidentiary hearing on the claim was subsequently held before Judge Mills on the petitions for modification. Thus, employer's right to present testimony to the judge ruling on the credibility of witnesses was protected, except to the extent that Judge Mills refused to disturb Judge McKenna's credibility determinations and relied on them instead of making is own de novo findings. In view of our decision to remand this case, discussed infra, this flaw will be corrected on remand. At this point, a new hearing need not be held, as the parties were permitted to submit new evidence before Judge Mills, and Judge Mills observed the demeanor of the witnesses before him. See generally Wynn v. Clevenger Corp., 21 BRBS 290 (1988).

In addition, employer contends that Judge Mills erred in determining that claimant is disabled from returning to his former employment. Employer contends that there is substantial evidence of record to support a finding that claimant's physical condition has improved, and alternatively, that it provided evidence of suitable alternate employment. Judge Mills found that employer presented sufficient evidence of a change in claimant's physical condition, but rejected Dr. Steiner's opinion that claimant has no residual impairment as Dr. Steiner also stated that claimant had

not actually sustained transverse process fractures as diagnosed by Dr. Cenac.[2] Judge Mills further stated that he would not disturb the findings of fact made by Judge McKenna with regard to claimant's ability to perform his usual work. Judge Mills also concluded that the evidence provided by employer's vocational rehabilitation expert did not fulfill employer's burden of establishing suitable alternate employment, and that although claimant is capable of earning more than established in the original decision, employer's request for modification was denied.

The standard for determining disability is the same during Section 22 proceedings as it is during initial adjudicatory proceedings. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990). Once the party seeking modification demonstrates a change in condition, claimant must establish only his continuing inability to perform his pre-injury job, see Trask v. Lockheed Shipbuilding & Construction, 17 BRBS 56 (1985); the burden then shifts to employer to establish the availability of suitable alternate employment. Ramirez v. Southern Stevedores, 25 BRBS 260 (1991).

Although Judge Mills found that employer presented sufficient evidence to establish a change in claimant's condition and that claimant is physically capable of doing more than he is willing to admit, he did not make an independent finding as to whether claimant is able to return to his former employment. Therefore, we vacate the administrative law judge's denial of employer's petition for modification and remand the case to the administrative law judge to render findings on whether the evidence is sufficient to establish a prima facie case of total disability. See Trask, supra. Furthermore, on remand, the administrative law judge must independently assess the credibility of the witnesses and render findings based on the entire record; he may not rely on Judge McKenna's credibility findings. See generally Dobson v. Todd Pacific Shipyards Corp., 21 BRBS 174 (1988).

Once claimant shows an inability to return to his usual employment, the burden shift to employer to demonstrate the availability of suitable alternate employment. See New Orleans (Gulfwide) Stevedores, Inc. v. Turner, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). The administrative law judge found that claimant is capable of earning more than that established in the original decision and that employer's vocational expert identified jobs

[2] The administrative law judge, however, rejected Dr. Cenac's opinion that claimant is currently temporarily totally disabled and thus denied claimant's petition for modification. See Decision and Order on Request for Section 22 Modification at 10. This finding has not been appealed.

that claimant was probably capable of performing, but that he did not have enough information on which to find that employer has sustained its burden under Turner. The United States Court of Appeals for the Fifth Circuit has reiterated that its decision in Turner held that an employer simply may demonstrate the availability of general job openings in certain fields in the surrounding community which are realistically available to claimant given his restrictions. Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); P & M Crane Co. v. Hayes, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991). The record in the instant case contains the testimony of a vocational rehabilitation expert, Michael Moffett, who reviewed medical records, depositions, the earlier hearing transcript, and the functional capacity evaluation prepared by Dr. Steiner. Mr. Moffett testified that generally claimant was employable in the fields of crane operation and welding. He also identified jobs that he considered suitable and available to claimant such as welder, crane operator, security guard, shuttler, watcher, exterminator, driver, and production worker. Tr. at 360-362, 382-383. Mr. Moffett identified specific employers and testified that these positions paid between $4.00 and $8.88 an hour. As there is evidence of record which, if credited, could establish suitable alternate employment, we vacate the administrative law judge's finding that employer has failed to establish suitable alternate employment. On remand, the administrative law judge must reconsider the evidence of suitable alternate employment in light of the Fifth Circuit's opinions in Guidry, supra, and P & M Crane, supra.[3]

Finally, employer contends that claimant should be barred from pursuing a claim pursuant to Sections 26 and 31 of the Act on the grounds that he perjured himself. Section 31(a) states that any false statement or representation, which is knowingly and willfully made for the purpose of obtaining benefits under the Act, is a felony, punishable by a fine of not more than $10,000 or imprisonment not to exceed five years or both. Further, Section 26 allows for costs to be assessed against a party who has instituted or continued a claim without reasonable grounds.

---

[3] In view of the procedural defect caused by Judge McKenna's failure to notify the parties of their right to request a new hearing on remand, and in light of the broad discretion afforded the administrative law judge in modification proceedings, see, e.g., Wynn, supra, 21 BRBS at 290, we note that Judge Mills may modify the award of past compensation if the evidence warrants it. Employer, however, would be limited to a credit for the overpayments against compensation due. See Ceres Gulf v. Cooper, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); 33 U.S.C. §§914(j), 922.

Consideration of an alleged violation of Section 31 properly lies with the United States attorney for the district in which the injury is alleged to have occurred. See generally Freiwilling v. Triple A South, 23 BRBS 371 (1990). Moreover, the Board may not award costs against claimant for instituting or continuing proceedings before the administrative law judge. Thus, we decline to further address employer's contentions regarding these sections.

Accordingly, the Decision and Order on Request for Section 22 Modification denying employer's request for modification is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge